GOVERNOR'S COMMISSION TO STUDY IMPLEMENTATION
OF THE EQUAL RIGHTS AMENDMENT
Suite 306, 60 West Street
Annapolis, Maryland 21401
Telephone: (301) - 267-1431

April 6, 1976

DRAFT

MEMORANDUM

TO: Bruce C. Bereano

NOT FOR DISSEMINATION

FROM: Ellen Luff

RE: Amendments to S. B. 358 (Third Reading File Bill), by House Judiciary Committee, Draft #1

I am submitting these comments on the SB 358 amendments. As you know, I strenuously oppose separating forcible vaginal intercourse out from other sexual acts and retaining the name "rape" for forcible vaginal acts. Also, the restoration of Sections 553 and 554 offend my sense of rational order. However, I do think it is important to establish the precedent of having degrees of sexual offenses in Maryland law, as well as the treatment of all forcible sexual acts be they vaginal, anal or oral, equally. Therefore I hope that the final version of SB 358 will be well drafted and will present the courts with as few ambiguities as possible. To that end, I am offering the following suggestions. (I have skipped over "mentally defective", "mentally incapacitated", and "physically helpless", but will return to these later.)

1. Sexual Act:

(a) Insert "the" on line 3 in front of the word "intrusion" on page 3, Amendment No. 9.

(b) On page 3, Amendment 9, the last sentence states that "sexual act does not mean or include an act for accepted medical purposes". This means that cunnilingus, fellatio, or anal intercourse are not prosecutable when they are for "accepted medical purposes". I can think of no instance in which cunnilingus, fellatio, or anal intercourse could be for "accepted medical purposes". The "accepted medical purposes" exception is necessary only to define that portion of sexual act which deals with the intrusion of parts of bodies or objects into genital or anal openings. I can see various arguments being raised as a result of the present wording: for instance, a doctor who would be charged with having cunnilingus with a patient, could argue that because of the present wording, that the legislature had recognized that cunnilingus, fellatio and anal intercourse did have a possibility of being used for "accepted medical purposes". It would seem that the section should be worded in such a way as to make it clear that the "accepted medical purposes" exception is only applicable to intrusions. It should be noted that I have been unable to find any other state that distinguishes between "sexual acts" and sexual contacts" in the manner

that you have proposed that Maryland should.

(c) I would suggest the following wording for Sexual Act: "Sexual act means cunnilingus, fellatio, or anal intercourse. Emission of semen is not required. Penetration, however slight, is evidence of anal intercourse. Sexual act also includes the intrusion, however slight, of any object into the anal or genital opening of another person's body if the intrusion can reasonably be construed as being for the purposes of the sexual arousal, gratification, or abuse of either party, and if the intrusion is not for accepted medical purposes."

(d) I do not like the phrasing of "sexual arousal or gratification or for abuse of either party" as it appears in this definition or in the definition of "sexual contact". Some of the states (i.e., Connecticut, Michigan and Ohio) use the phrase "for the purpose of sexually arousing or gratifying either person." I prefer the addition of "abuse" lest there be any ambiguity as to whether a person is being aroused or gratified, and I would suggest the wording used by Colorado: "for the purposes of sexual arousal, gratification, or abuse". If you must add "of either party", I would phrase it "for the purposes of sexual arousal, gratification, or abuse of either party."

2. Sexual Contact:

(a) Under the definition of "sexual contact" as drafted, no crime would be committed under the provisions of this bill if someone forced someone else to touch them. This would not include the common situation where one party forces another party to masturbate the first party. It would also not include the example given by Sandra O'Connor in front of the House Judiciary Committee where a person forced another person to insert her hand up his anus and subsequently forced her to insert her hand into her mouth. It would also seem that under the definition of sexual contact, that a touching with the penis of the genital area, which touching is just short of penetration, would not be a criminal act. It is possible that the court would hold that by the use of two separate words, i.e., "intrusion" and "penetration", that the legislature viewed an "intrusion" as requiring less insertion than a "penetration". I think it is risky to retain the present scheme since it is known that criminal statutes are very closely scrutinized by the defendants.

(b) If your intention was to not include any specific act in both "sexual act" and "sexual contact", you have not succeeded. Penetration by objects is explicitly included in "sexual act" and is implicitly included in "sexual contact" in that a touching by an

object would also be an "intentional touching of any part of another person's anal or genital area". It has been held that the touching required for the crime of battery, can include indirect touchings such as by objects. Clark and Marshall, Section 10-19, page 654. I have reviewed the statutes of various states and it appears that most of them include intrusions whether by objects or bodies into the anal or genital area as "sexual acts" even if they name them other names, such as "sexual penetration" or "sexual intrusion". They reserve sexual contact for other less serious touchings. (cf. Michigan, Colorado). As I recall the reason why we have been struggling to separate penetration by objects from penetration by parts of the body, is that at the Special Committee on Rape and Related Offenses Committee hearings, one member was reluctant to criminalize digital manipulation of genitals with minors as a first degree offense. I feel that these objections are met by the employment of the 4 year age differential, where the situation of two teenagers in the back seat of a car would rarely be prosecutable. Furthermore, even if a 17 year old was to be digitally manipulating a 12 year old, it would only be a third degree sexual offense. I suggest, therefore, the following wording:

> "Sexual Contact - means the intentional touching of another person's anal or genital areas or other intimate parts, or the intentional touching of the actor's anal or genital areas or other intimate

parts by the victim, if the sexual contact can be reasonably construed as being for the purposes of sexual arousal, gratification, or abuse. It does not include acts commonly expressive of..."

If you wish to exclude acts which are "sexual acts", you could add a sentence: "Sexual Contact does not include any act which constitutes a "sexual act"." I personally do not favor the addition of the last sentence and would bring to your attention the fact that under both Michigan and Colorado law, a person who was guilty of sexual penetration or sexual intrusion, could also be guilty of sexual contact. If you structure the degrees and definitions in such a manner that sexual contact does not include sexual act, you could have the situation that you find in larceny after trust and embezzlement cases, where the judge directs a verdict on one of the two counts and the Court of Appeals reverses, holding that a person were they to be guilty, would only be guilty of the other count, and the person gets off scot-free because of the doctrine of double jeopardy.

(c) Analingus is not covered by either the definition of sexual act or sexual contact. Analingus would be oral-anal contact, whether the actor was to perform the anal or oral part. The definition of "sexual act" does not include analingus, and the definition of "sexual contact" specifically excludes it when it excludes tongue intrusions into the anal opening; therefore this particular

and not uncommon act would not be covered.

3. Group Sex With Defectives, Et. Al.

Under the proposed amendments, a person would be guilty of rape in the first degree if the person engaged in group sex with a mental defective. They would also be guilty of sex offense in the first degree if they indulged in group sex with a mentally defective. This would mean that two 14 year olds who indulged in sexual relations with a 30 year old mentally defective person, could find themselves being charged with either rape in the first degree or sex offense in the first degree and being treated as adults from the onset. People who indulge in group sex with 13 year olds would also be guilty of a rape in the first degree or a sex offense in the first degree, although this is not as disturbing since the requirement that the actor be 4 or more years older than the victim would still apply. This situation can be easily remedied if Section 462 (A) is re-written so that it reads "A person is guilty of rape in the first degree if the person engages in vaginal intercourse with another person by force or threat of force against the will and without the consent of the other person, and:". Similarly, on page 5 of the Amendments, Section 464 should be re-written so that it reads "A person is guilty of sex offense in the first degree if the person engages in a sexual act with another person by force or threat of force against the will and without the consent of the other person, and:".

4. Style Inconsistencies:

Section 462 and 464 are inconsistent in style with Section 464B, although they are parallel crimes, the first two dealing with forcible vaginal intercourse and forcible sexual acts respectively, and the third section dealing with forcible sexual contacts. The three crimes, of course, also include identical prohibitions against sexual behavior with defectives and persons 12 or under. I would prefer the style used in Section 464B, and suggest that the other sections be made to conform thereto.

5. Intercourse With 14 and 15 Year Olds:

While you have criminalized "sexual acts" with 14 and 15 year olds in Section 464C (page 7), nowhere do you make it a crime to have vaginal intercourse with someone who is 14 or 15. I would suggest that you insert in 464C (A) (2) after "act", "or vaginal intercourse".

6. De-Criminalization of Murder:

On page 7, Section 464D, it is stated that "A person may not be prosecuted under this subtitle (sic) if the victim is a person's legal spouse". You should note that in Article 27, "Crimes and Punishments" is a subtitle, and that the next subtitle is "Venue, Procedure and Sentence". Therefore among

other things, you would be de-criminalizing spousal murder.

7. Sodomy and Perverted Practices:

(a) I believe I understand the intention of the amendments to Sections 553 and 554: you would like to make it impossible in cases of forcible anal and oral sex to have shotgun indictments and allow judges and juries to elect to convict under Sections 553 and 554 when the fact circumstances would warrant convictions under Sex Offense No 1 or Sex Offense No. 2. I do not believe your amendments achieve this. It would seem that the inclusion of the phrase "to the extent not prohibited by Sections 461-464C of this Article" in front of each of these subsections does not mean that if you could convict someone under Sections 461-464C, that therefore you would not be able to convict someone under Section 553 or 554. Sections 461-464C do not prohibit any convictions under any other section. A further ambiguity is created by the fact that by inserting "consent", it is unclear as to what is accomplished. In any forcible sexual act, the person who actually perpetrates the act is consenting, whereas the victim presumably is not consenting. I do not think it is possible for you to do what you have set out to do. There may be situations where it is unclear whether or not the sodomous act is consensual or non-consensual and the ultimate resolution of this problem will only be had when the jury decides. If Maryland finds that sodomy is a crime and

a serious felonious crime at that, surely even if the act that is brought to the law enforcement officer's attention is not forcible, the person should be convicted because it is consensual. I do not see any way that you can prohibit multiple count indictments that would include all possible crimes. If you persist in wanting to do this, you could add the phrase "No person shall be convicted under this section if the person is guilty of a violation of Section 464, 464A, or 464C (A) (2)." You should also attempt to create some sort of statutory merger.

(b) I strenuously object to the insertion of the words "consensual" or "by consent" in Sections 553 and 554. If this is enacted this will constitute a legislative declaration that the legislature does in fact think that consensual acts should be criminalized. This could be the signal for prosecutors and police to actually attempt to enforce these statutes. It could also be used in an adverse fashion against someone challenging the constitutionality of the sodomy and perverted practices statutes as they apply to married people, an issue clearly not decided by the recent Supreme Court case.

(c) At the present time a spouse who forcibly sodomizes or forces the other spouse to indulge in forcible oral sex, is prosecutable under Sections 553 and 554. The way this bill will be constructed, under 464D, it would not be a sexual offense if the person who was

forcing the other person was the person's legal spouse. It can be argued that because of the wording added by the amendments to Sections 553 and 554, that neither could these people be prosecuted under Sections 554 and 555. Therefore you have de-criminalized forcible sodomy and forcible perverted practices as it applies to spouses, something which I strenuously and vigorously object to. Let me point out that in my divorce practice I have run into several instances of forcible sodomy, and the victims find this practice highly objectionable notwithstanding the fact that the actor is the husband. It also seems to be a tremendous inconsistency in saying that sodomy is heinous enough to make a felony, yet it is okay to force someone else to do this if they are your spouse. I urge you to solve all these problems by leaving Sections 553 and 554 exactly as they are at the present time in the law.

I hope that this memorandum will be of assistance to you.

cc: Stuart G. Buppert, III

(Dictated but not read)

7603